

BRB No. 93-1974

FRANCES ROBINSON)	
)	
Claimant)	
)	
v.)	
)	
BATH IRON WORKS CORPORATION)	
)	
and)	
)	
GUARANTY FUND MANAGEMENT)	DATE ISSUED:_____
SERVICES)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order of Eric Feirtag, Administrative Law Judge, United States Department of Labor.

H. Peter Del Bianco, Jr. (Black, Lambert, Coffin & Rudman), Portland, Maine, for employer/carrier.

Karen B. Kracov (J. Davitt McAteer, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (92-LHC-1610) of Administrative Law Judge Eric Feirtag rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in

accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer for approximately eight months during 1942-1943. During the course of her employment, she was exposed to asbestos. In 1972, she returned to work for employer as a secretary and worked until her voluntary retirement in 1986.¹ Claimant sought benefits for a permanent respiratory impairment, and the administrative law judge awarded compensation for a 30 percent impairment to the whole person pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23) (1988), medical benefits, and an attorney's fee. Additionally, he awarded employer relief from continuing liability for compensation pursuant to Section 8(f), 33 U.S.C. §908(f). Decision and Order at 3-5. The Director appeals the award of Section 8(f) relief, and employer responds, urging affirmance.²

The sole issue raised on appeal is whether the administrative law judge properly awarded Section 8(f) relief to employer. The Director contends the administrative law judge erred in awarding Section 8(f) relief because employer failed to demonstrate that claimant had a pre-existing permanent partial disability which contributed to her present condition. Employer responds, arguing that claimant's smoking-related diseases (chronic obstructive pulmonary disease (COPD), emphysema, and chronic bronchitis) pre-existed the diagnosis of asbestosis and materially and substantially contribute to claimant's present condition.

Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted this Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that her current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *see generally CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991); *Dominey v. Arco Oil & Gas Co.*, ___ BRBS ___, BRB No. 94-2471 (Aug. 20, 1996); *Quan v. Marine Power & Equipment Co.*, ___ BRBS ___, BRB No. 92-861 (Aug. 15, 1996). A pre-existing permanent partial disability is one which must produce a serious lasting physical problem prior to the injury on which the compensation claim is based. *C&P Telephone*, 564 F.2d at 513, 6 BRBS at 415; *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom.*

¹There is no allegation of asbestos exposure during this period.

²On August 9, 1996, the Board issued an order informing the parties of its inability to obtain a copy of the hearing transcript for this case and advising them that the appeal will proceed without the transcript unless there are objections. The time for filing objections has expired with no party responding; consequently, we will decide this case based on the record before us.

Argonaut Ins. Co. v. Mikell, 14 F.3d 58 (11th Cir. 1994).

In the instant case, the administrative law judge's discussion of Section 8(f) consists of little more than the following:

[Dr. Wood's] office notes show that Ms. Robinson had a long smoking history and a history of chronic respiratory symptoms. These smoking related pulmonary problems constitute a pre-existing permanent disability discoverable by a concerned employer. Dr. Killian, the physician who evaluated the extent of the claimant's disability, testified that the present impairment is due to the combination of the effects of smoking and the effects of exposure to asbestos, and that such impairment is more severe than it would have been if she had either one alone.

Decision and Order at 4-5.

A review of the medical evidence of record reveals that claimant suffers from a variety of respiratory conditions, including smoking-induced COPD and emphysema.³ The record contains x-ray and CT scan reports dating from 1983 to 1992. Additionally, there is testimony from Drs. Killian and Wood regarding claimant's condition, and both question the presence of asbestosis but acknowledge that claimant has asbestos-related pleural plaquing. Medical opinions of record make it necessary for the administrative law judge to determine the order in which claimant's conditions were diagnosed and whether any of those conditions meet the criteria for being a "pre-existing permanent partial disability." Because of the brevity of the administrative law judge's discussion, we are unable to ascertain which disability or disabilities he concluded pre-existed the work-related injury. Further, the absence of a full analysis prevents us from reviewing his conclusion that the contribution element is satisfied. Therefore, we vacate the administrative law judge's award of Section 8(f) relief. The case is remanded to the administrative law judge for further consideration and a full discussion of the medical opinions consistent with applicable law. *Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988); *see generally Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

³Smoking does not qualify as a pre-existing disability unless it results in a physical impairment to the employee. *General Dynamics Corp. v. Sacchetti*, 681 F.2d 37, 14 BRBS 862 (1st Cir. 1982).

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge